the petitioner and Terese owned, including the petitioner's computer business as well as Terese's billing and office manager software program she had developed for mental health professionals.

Terese even warned her mother, the petitioner, that they should not trust Wesley. For three months preceding her death, Terese, an independent and outspoken woman, told the petitioner that Wesley was a bully, could not be trusted, and was jealous of Terese because she had surpassed his software programming knowledge. She asked the petitioner to mediate between her and Wesley and the petitioner responded by defending Terese when Wesley tried to disparage Terese's work. But Wesley continued to seek ownership of the software program Terese was developing for his own economic benefit and he sought to take control of Giant Computer as well.

Wesley's behavior toward Giant Computer personnel grew more aggressive and intimidating through early June of 1992, prompting the petitioner to confront him about his narcissistic personality traits which she thought, as a psychotherapist, contributed to his difficulties. The next day, June 9, 1992, the petitioner discovered that $12,000 worth of Giant Computer's office expenses had been charged by the Wesleys to her credit card and she again confronted Wesley about it. He agreed to control his spending and to come up with his share of the business' capital investment. At that time, the petitioner agreed that the Wesleys could pick up her computer from her home that evening.

Another meeting that afternoon between the petitioner and the Wesleys was acrimonious. The Wesleys were furious that the petitioner had characterized Wesley as having a narcissistic personality disorder; and Wesley threatened the petitioner stating,

"...I have known you for two years and have never seen you cry. Girl, I'm going to break you. I'm going to see you cry." As the petitioner left, Wesley wanted to know when she would be coming home that evening and she responded that it would be close to midnight. By the time the petitioner returned home that evening around midnight, her daughter Terese was already dead, the coroner estimating the time of death to be after 9:00 P.M. on the night of June 9, 1992.

The private investigator's evidence further indicated that immediately after Terese's death, Wesley continued to implement his plan to have the petitioner fund Giant Computer while leaving Wesley and his wife to run the company as they saw fit. He attacked the petitioner three weeks after her daughter's death as not being sufficiently remorseful; and soon after, Wesley unsuccessfully tried to have the petitioner resign as CEO of Giant Computer because she refused to provide another $25,000 to fund the company. In July of 1992, he asked the petitioner for $25,000 to license Terese's software program. She refused. In August of 1992, Wesley convinced the petitioner to take out a $250,000 life insurance policy on her own life naming Giant Computer as the beneficiary. In early September of 1992, the petitioner refused to meet the Wesleys' supposed $40,000 investment in Giant Computer after the Wesleys could not produce a record of their contribution. The petitioner further refused a demand by Wesley in September of 1992 that she invest another $10,000 to market Terese's software and she informed Wesley that he had no legal right to her daughter's software.

When Wesley threatened the petitioner to stay away from Giant Computer's office, she concluded that Wesley must be discharged from the company. However, the Wesleys had already presented falsified corporate

documents to bank officers in order to replace the petitioner's name on Giant Computer's accounts with Wesley's name. The petitioner later discovered that the Wesleys had charged thousands of more dollars to her charge accounts. On September 24, 1992, the petitioner faxed termination letters to the Wesleys even when Lynn Wesley was writing the petitioner that they still needed to finish establishing her living trust in the Wesleys' favor!

In response to the termination letter, the Wesleys took over Giant Computer's premises, changed the locks, brought in a guard dog and occupied it day and night. Wesley began a campaign to ruin the petitioner's reputation, telling all of Giant Computer's customers that she was promiscuous with men and a lesbian who had murdered her own daughter. He left threatening messages on her answering machine promising to revoke her psychotherapy license, to instigate a murder investigation against her and to destroy her standing in the community.

In October of 1992, the petitioner together with other investors in Giant Computer filed a civil action against the Wesleys seeking damages for defamation, conspiracy and fraud. The Wesleys then began removing inventory and furnishings from the Giant Computer premises and forcibly collected more than $25,000 in accounts receivable. In December, 1993, Wesley escalated his accusations against the petitioner by asserting to her private investigators that she had an ongoing incestuous relationship with Terese. In October of 1994,a Riverside Superior Court jury awarded the petitioner $1.7 million in compensatory and punitive damages. The jury further recommended that the case be referred to the Riverside District Attorney's Office for criminal charges. The Wesleys have never paid the petitioner any damages.

In January of 1996, the Wesleys were arrested and incarcerated on charges of committing felony criminal fraud on the petitioner. On April 23, 1996, under the terms of a plea bargain, Wesley was sentenced to one year in jail and Lynn was given 120 days in jail to be served on weekends. Wesley was eventually released on parole on July 10, 1996. Soon after, the petitioner and her son Shane began receiving crank phone calls; and Shane reported suspicious activity in and around his home. Once Wesley's parole officer told Wesley that he was aware of this activity against the petitioner and her son, it stopped.

The petitioner's private investigation further unearthed abundant evidence that the Wesleys are con artists who had perpetrated their fraudulent investment schemes totaling over $1 million on several other individuals in California and other states. In addition, it was discovered that Wesley (who has several aliases and Social Security numbers) had never been divorced from his prior wife before marrying Lynn; he almost blinded his former wife in a domestic assault; and he repeatedly beat and locked his daughter in her room for up to two weeks. He has been excommunicated twice from the Mormon Church (in 1986 and in 1993), both times for defrauding Church members. Ultimately, the Mormon Church filed a lawsuit against the Wesleys to force them to vacate Mormon land where they had illegally resided for over three years.

During his interview with the petitioner's private investigators, Wesley had no alibi for his actions on June 9, 1992, after 10:00-10:30 P.M. when Terese was murdered. In fact, he had intended to pick up a computer at the petitioner's house that evening and knew that the petitioner would not be home until around midnight. He was familiar with the gun given the petitioner, knew where it was located in her home, and knew how to

handle the gun, even stating that he knew what it sounds like when fired and that it had been wiped clean of fingerprints. Furthermore, he possessed keys to the petitioner's home, had free access to come and go as he wished and knew how to lock and unlock the double deadbolt lock. Wesley also claimed that he was the last person to see Terese alive and thought he was a suspect in her death(at the time he made these statements, the police claimed her death was a suicide).

While repeatedly contradicting himself, Wesley described various details of Terese's murder to the petitioner's investigators, details which he could not have known unless he was present at the death scene including how the blood flowed from the wound, the trajectory of the bullet, the blood spattering on the walls, the three bullets in the gun and the absence of fingerprints on the gun.

The investigation also located witnesses (James and Sara Neely) who reported that Lynn Wesley told them that she and John Wesley went to the petitioner's house around 10:00 P.M. on the evening of June 9, 1992, "to do some computer work" but left because no one was home, a statement which undermines John Wesley's claim that they never went to petitioner's house that evening. Other percipient witnesses (neighbors and a friend) reported seeing Terese's pickup in the petitioner's driveway, parked at a crooked angle, from between 9:40 and 10:25 P.M., undermining Lynn Wesley's claim that no one was home. Moreover, another witness (Arlene Wood) observed two people in a light-colored car parked in front of the petitioner's house during this time with one of the occupants resembling Terese. When the petitioner came home at midnight, Terese's pickup was now parked *straight* in the driveway.

The Wesleys' behavior immediately after Terese's

death provokes further inquiry. They showed up uninvited and unaffected by the tragedy of Terese's death at the petitioner's home on the morning of June 10, 1992, while the Sheriff's Department was conducting its investigation. Once the police left and the petitioner went to find her son, they stayed at the home and wiped the blood from the walls in the spare bedroom where Terese was killed. At this time, Wesley told Dr. Peggy Taylor that this was not a suicide, that he knew who had done it—that she was killed "by a narcissistic personality disorder...."

According to Dr. Taylor, Wesley then began to examine Terese's computer, searching for (he claimed) a suicide note. Everyone except the Wesleys eventually left the petitioner's home and the Wesleys were the last to leave. Many of Terese's notebooks, her journal and personal writings remain missing. Wesley admitted to the petitioner's investigators that he was able to obtain possession of Terese's software program for mental health professionals after her death and he hired one Judy Wagner to finalize its development so that he could market it for profit.

In the weeks after Terese's death, Wesley became more insistent that the petitioner invest more money in Giant Computer, give the Wesleys more control of the company, execute a living trust in their favor, obtain life insurance on her own life in favor of Giant Computer and pay them a fee to license Terese' software program. When the petitioner balked at these incessant demands and began to end the Wesleys' control over her life, John Wesley responded by defaming the petitioner, claiming that she was a "slut" with men, that she and Terese had been in an incestuous lesbian relationship and that the petitioner had murdered her own daughter. All of this outrageous conduct led to the petitioner's lawsuit against

the Wesleys for defamation, conspiracy and fraud and the jury's ultimate damage award in her favor of $1.7 million.

As the petitioner's investigator concluded at the end of this nine-year process, "[t]he evidence has convinced [the petitioner] and me that Terese was murdered by John Wesley....A search of the Wesleys' living quarters, safe deposit boxes, and their mini-storage space might uncover some of Terese's notes and her journal taken from her [apartment by Wesley]."

Armed with this investigatory packet of evidence showing that her daughter was murdered by John Wesley, the petitioner contacted the California Attorney General's Office in San Diego. However, the Senior Assistant Attorney General referred the matter back to the Riverside County District Attorney for a renewed investigation. Chief Deputy District Attorney Michael Soccio then assigned the case to the respondent, Senior Investigator Martin Silva("Silva").

The petitioner met with Silva on February 22, 2001, and consistent with her investigatory packet, she outlined thirty-one (31) pieces of evidence her investigation had unearthed concerning Wesley's lack of credibility, his financial motives to kill Terese, his aggressive behavior towards her daughter during the weeks preceding her death which required the petitioner to intercede on three separate occasions and his suspicious conduct in the immediate wake of Terese's death, including washing the blood spatters off the wall of the bedroom while the petitioner was away from the house.

However, neither Soccio nor Silva reviewed the petitioner's investigatory evidence with her. Indeed, by this time, Silva had already targeted the petitioner—*not* Wesley—as the prime suspect in Terese's death based on Wesley's statements in the file that she and Terese had

been in an incestuous lesbian relationship and that the petitioner had murdered her own daughter, the very unsubstantiated slanderous statements which led to the petitioner's lawsuit against the Wesleys for defamation and conspiracy for which a Riverside County Superior Court jury awarded the petitioner $1.7 million in damages. As Silva stated to the petitioner, "[e]ither you killed her, or it was suicide....In these cases, we just want to get closure," a message to the petitioner that if she accepted the Sheriff's Department's finding of a suicide, she would not be pursued as a murder suspect.

Instead of locating John Wesley and searching his living quarters, safe deposit boxes and mini-storage space to uncover Terese's notes and her journal which he took from her apartment the night of or the day after her murder, Silva visited the petitioner's residence alone late at night on February 28, 2001, asking for files she had mentioned in an interview earlier that day (which she gave him)and then questioning her at length about her sexuality and her sex life. During this "interview," Silva, echoing Wesley's unsubstantiated slander for which a jury awarded her damages, accused the petitioner of molesting Terese as a child, of being a lesbian and of having an incestuous relationship with Terese in 1992. The petitioner strenuously denied these accusations and affirmed that she had never molested her daughter, had never had any lesbian contact in her life and was instead heterosexual.

On March 27, 2001, Silva then authored a fourteen-page affidavit in support of a warrant to search the petitioner's present home (not the house where the murder occurred) for "[a]ll writings and recordings by [the petitioner] pertaining to this case." In his affidavit, Silva asserted that after reading all the files and listening to several tape recorded interviews, he believes "the

possibility of a homicide exists and that [the petitioner] is the most likely suspect...[because she] was the only known subject that might have been around Terese at the time of her death."

Silva's affidavit intentionally omits at least thirty-one (31) salient facts which would have been material to the magistrate's assessment of probable cause to believe that the petitioner had murdered her daughter and that her writings and recordings sought in this warrant would be relevant to her prosecution. Silva intentionally did not tell the magistrate that John Wesley, upon whom Silva relied to repeat the defamatory insults that the petitioner and Terese had been in an incestuous lesbian relationship and that the petitioner had murdered her own daughter, was convicted of felony fraud against the petitioner in 1996; that he was found liable for slander, conspiracy and fraud as a result of these same statements by a Riverside County Superior Court jury which awarded $1.7 million in damages to the petitioner, none of which was ever paid; that Silva did not believe these statements by Wesley; that Wesley threatened the petitioner the day before Terese's murder; and that besides defrauding the petitioner, the Wesleys scammed other victims in California of over $1 million between 1987 and 1992.

In addition, Silva never told the magistrate that Wesley stole Terese's software program for his own profit, a clear motive to kill her; that Wesley told various people that he, *not* the petitioner, was the last person to see Terese alive; that he had been excommunicated from the Mormon Church for committing fraud upon Church members; that he is a bigamist who has abused his former wife and his daughter; that Wesley forcibly and illegally sought to take over Giant Computer, petitioner's company; that he superintended the destruction of physical evidence in the petitioner's home by washing

blood off the walls the day after Terese's murder while the petitioner was gone from the home; that Wesley told Dr. Peggy Taylor that a "narcissistic personality" had killed Terese, one day after the petitioner confronted him about his "narcissistic personality;" that Wesley, according to various witnesses, appeared to be "exhilarated" after the murder; that he told three different stories about how Terese died shortly after her murder; that he harassed both the petitioner and her son after being paroled on his felony fraud charges; and that Wesley had keys and unfettered access to the petitioner's home at the time of the murder and no alibi.

Besides these omissions, Silva intentionally *misstated* the fact that Wesley had an alibi for the time of Terese's murder when, in fact, he did not; that Wesley stated to investigators that Terese was siding with him and not the petitioner in certain business disputes when, in fact, Wesley stated no such thing; that the petitioner "felt guilty" leaving Terese in the room where she found her, implying culpability when, in fact, the petitioner felt guilty only that her horror forced her from remaining in the room with her deceased daughter; and that she did not cry immediately after her daughter's death, again implying culpability, when, in fact, the petitioner reported to Silva she was in such shock for days she was unable to cry.

Silva also misstated in his affidavit that the petitioner was not upset about when questioned about her sexual relationships when instead the petitioner had been so upset that she sued and won a jury verdict based upon Wesley's statements about her "sexual relationships; and that the petitioner did not emotionally react when Silva accused her of killing Terese when, in fact, her attorney notified Silva that she was so traumatized by his accusations, she had placed herself in

treatment with a psychiatrist, psychologist, medical doctor and her religious practitioner. Finally, Silva averred falsely that no one but the petitioner was at home when Terese's head may have been moved consistent with the blood pattern on her face when, in fact, several witnesses confirmed the presence of others at petitioner's home during this time frame and Lynn Wesley herself stated that the Wesleys were at the petitioner's house during the time when Terese was murdered.

On March 27, 2001, Judge Becky Dugan of the Riverside County Superior Court issued a search warrant based upon Silva's affidavit(App. 5). Later that day, Silva and four other male officers executed the warrant on the petitioner's home and vehicle, tearing apart her house, garage and vehicle, seizing nearly every written or tape recorded piece of information(*Id.*). During the search, the officers prevented the petitioner from phoning her attorney and demanded that she remain seated or be handcuffed. During the search, the petitioner stated to Silva's colleagues that he believed that the petitioner is a lesbian, that she molested her own daughter and then killed her so that she wouldn't tell others. Silva denied that he believed this but stated that it was "a control issue."

In fact, every key witness who implicated John Wesley in Terese's death *was never interviewed by Silva* as part of his "investigation." Instead, Silva's "investigation" ignored all of the petitioner's investigatory packet of evidence while "cherry picking" isolated parts of Wesley's discredited, self-serving statements to petitioner's investigators to make it appear to the issuing judge that the petitioner had killed her own daughter. Silva's acts resulted in no charges ever being brought against anyone—including John Wesley--- for the

murder of Terese Stewart(App. 5).

Believing that Silva's search and seizure was not an honest collection of evidence concerning her daughter's murder but was instead a blunt attempt by the Riverside County District Attorney's Office to intimidate, harass and punish her for attempting to secure an investigation of Terese's death, the petitioner in March of 2002 brought this civil action for damages under 42 U.S.C. Section 1983, in the federal district court against the District Attorney, Riverside County, Silva and unnamed county law enforcement personnel. Voluntarily dismissing her complaint against all of the defendants except Silva, the petitioner alleged that his affidavit in support of the search warrant violated her constitutional rights under the Fourth and Fourteenth Amendments as well as her civil rights under Section 1983(App. 5).

She claimed that Silva's false and fraudulent affidavit violated her right of privacy, humiliated and shamed her and caused severe emotional distress warranting an award of damages. The petitioner alleged that Silva was not entitled to qualified immunity since no reasonable police officer in like circumstances could have believed that his actions were lawful in light of clearly established law and the information he possessed when he authored his false and fraudulent affidavit.

Silva then moved for summary judgment asserting his qualified immunity(App. 5-6). By agreement, the motion was heard by the Magistrate Judge Stephen G. Larson and on March 17, 2004, he issued his decision granting Silva summary judgment(App. 4-18). In order to survive such a motion in the Ninth Circuit based upon Silva's claim of qualified immunity, the petitioner was bound to make a substantial showing of deliberate falsehood or reckless disregard for truth by Silva in

drafting his affidavit *and* establish that but for the dishonesty, the challenged action, i.e., the issuance of the search warrant, would not have occurred(App. 7-8).

While the Magistrate was "disturbed by both the nature and quantity of the... misstatements and material omissions in Detective Silva's affidavit" (which satisfied the first prong of the petitioner's burden), he was compelled by the law of the Ninth Circuit to conclude that even when those false statements are omitted and the material omissions are included, "Detective Silva's affidavit...establishes sufficient probable cause for a reasonable magistrate to have found that present in [the petitioner's] then current residence, there existed writings and recordings by [the petitioner] *relevant to the murder investigation* at the time Detective [Silva] applied for the warrant(App. 8-9;10;16)(emphasis supplied).

The petitioner appealed and on December 27, 2005, the court of appeals for the Ninth Circuit affirmed the Magistrate's ruling in an unpublished memorandum opinion(App. 1-3). It concluded that "[u]nfortunately, Section 1983 does not provide a remedy for [the petitioner's] claimed injuries" even though it found that the petitioner "has made an adequate showing that Silva 'deliberately or recklessly made false statements [and] omissions in his affidavit'"(App. 2 quoting *KRL v. Moore*, 384 F.3d 1105, 1117(9th Cir. 2002)). As the court of appeals ruled, these misstatements and omissions were not material to a finding of probable cause because when the affidavit was redacted, the affidavit still states that the petitioner "possessed material at her residence relating to the murder of her daughter"(App. 2). Since there was probable cause for its issuance, the search warrant did not violate the Fourth Amendment "regardless of any wrongs committed by Silva"(App. 2-3).

On January 17, 2006, the court of appeals denied

the petitioner's timely petition for rehearing(App. 19).

REASONS FOR GRANTING THE PETITION

1. The Result Below Is In Conflict With *Malley v. Briggs*, 475 U.S. 335 (1986), *Illinois v. Gates*, 462 U.S. 213 (1983), *Franks v. Delaware*, 438 U.S. 154 (1978) And This Court's Decisions Establishing Summary Judgment Procedure.

In ruling that Silva was entitled to qualified immunity, the Magistrate *four* times in his decision assumed that Silva drafted the affidavit as part of his "on-going investigation" into Terese's death(App. 5;10;15;16). This assumption is fundamentally at odds with the petitioner's core showing below which created genuine issues of material fact for a jury (1) whether Silva *was conducting any investigation at all* into Terese's murder when he applied for a search warrant; and (2) whether his admittedly fraudulent affidavit (and the search warrant it produced) was intended not to unearth relevant evidence about Terese's death but to retaliate against the petitioner for her attempts to have the police investigate her daughter's murder since 1992. The court of appeals likewise failed to address these unresolved, genuine, triable issues of material fact identified by the petitioner's proof.

First, there is no basis for finding that an "on-going investigation"(App. 15) was afoot when the petitioner's summary judgment materials identified 31 misstatements or omissions of crucial facts in Silva's affidavit, *all sanitizing John Wesley, the prime suspect in Terese's murder*. Silva's "investigation" included interviewing *none* of the witnesses who implicated Wesley in Terese's death; he ignored most, if not all, of the petitioner's

investigatory evidence, accumulated over nine years; and he most likely failed to interview Wesley himself while "cherry picking" isolated parts of his discredited, self-serving statements to petitioner's investigators, all to make it appear as if petitioner had killed her own daughter. Contrast *Illinois v. Gates*, 462 U.S. 213, 241-244(1983) (independent police investigation); *Malley v. Briggs*, 475 U.S. 335, 352(1986)(Powell, J., concurring in part)("the gathering of information is the province of the police"). Silva's "investigation" resulted in *no* charges ever being brought against anyone—including John Wesley or the petitioner--- for the murder of Terese.

Second, there is a solid basis in the summary judgment materials for a jury to find that Silva's conduct was improperly motivated retaliation against the petitioner "for speaking out on a matter of public concern," i.e., the murder of Terese Stewart, an integral part of her constitutional claim. *Crawford-El v. Britton*, 523 U.S. 574, 588; 592(1998). Silva's failure to investigate; his deliberate refusal to consider the petitioner's evidence showing that Wesley most likely murdered Terese; his focus on the petitioner to the exclusion of Wesley as the murderer despite this evidence; his late-night interview of the petitioner alone in her home; his threatening, accusatory behavior; his aggressive, demeaning search of her home when she was willing to give him any document he wanted; his admittedly fraudulent affidavit; and his wanton adoption of Wesley's salacious and despicable statements, the very ones which led a Riverside County Superior Court jury to award the petitioner $1.7 million in damages, all combine to present a jury question whether Silva was retaliating against the petitioner for seeking an investigation of her daughter's murder rather than conducting one himself.

While Silva's improper motive is initially irrelevant

to the question of his qualified immunity, *id.* at 589;592, the jury issue of whether Silva was actually conducting an investigation when he applied for the search warrant goes directly to the finding of probable cause under *Gates*, 462 U.S. at 238-239. See *Graham v. Connor.* 490 U.S. 386, 397(1989).(App. 8-9). Conceding, as both courts below have, that Silva dishonestly included or omitted information in his affidavit, the petitioner was obligated to establish under the Ninth Circuit standard set out in *KRL v. Moore*, 384 F.3d at 1117 and *Hervey v. Estes*, 65 F.3d 784, 789(9th Cir. 1995), that the remaining information in his affidavit was insufficient to establish probable cause under *Gates*. See *id.*, citing *Franks v. Delaware*, 438 U.S. 154, 155-156 (1978).

In deciding that the affidavit when revised to reflect Silva's misstatements and omissions established probable cause, both courts assumed as a fact that Silva was conducting a legitimate investigation. Having persuasively rebutted this assumed fact with her summary judgment materials, the petitioner created a jury question about *another omission by Silva* in his affidavit beyond those already identified which should have been included in any revised affidavit, i.e., *that he was not conducting a legitimate investigation into Terese's death when he applied for a search warrant.* See *Anderson v. Creighton*, 483 U.S. 635, 641(1987)(qualified immunity inquiry may necessitate determining certain essential facts). If this crucial omission were included in any revised affidavit, no magistrate would have issued the search warrant consistent with *Gates, supra*, and *Malley*, 475 U.S. at 345-346. Silva was therefore not entitled to a qualified immunity on this record.

Silva-- not the petitioner--was the party moving for summary judgment. As this Court made clear in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S.

133, 150-151(2000), the Magistrate in reviewing the motion materials should draw all inferences in favor of the petitioner and make no credibility determinations because this is a function of a jury, not a judge. *Id.* citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). The Magistrate should have disregarded all evidence favorable to Silva that a jury was not required to believe and "give credence to the evidence favoring the [petitioner] as well as that 'evidence supporting [Silva] that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested parties.'" *Id.* quoting 9A C. Wright & A. Miller, Federal Practice and Procedure, Section 2529, p. 300 (2d ed.1995). See *Crawford-El v. Britton*, 523 U.S. at 595-596. Measured by these standards, a fair minded fact finder could return a verdict for the petitioner on this record on the issue of whether or not Silva was conducting a legitimate investigation when he applied for this search warrant. His summary judgment motion therefore should have been denied. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 252.

2. The Ninth Circuit's Formulation Of The Burden Which Civil Rights Plaintiffs Must Bear In responding To Motions For Summary Judgment Based Upon Qualified Immunity Undermines The Remedies Provided Them By 42 U.S.C. Section 1983.

This Court has held that the Constitution prohibits a police officer from making knowingly or recklessly false statements in support of a search warrant. *Franks*, 438 U.S. at 165-166. The Ninth Circuit has further held that when a police officer moves for summary judgment on the basis of his qualified immunity to a plaintiff's Section 1983

action for damages arising out of his falsified application for a search warrant, the plaintiff must establish that without the dishonestly included or omitted information, the magistrate would not have issued the warrant. *KRL v. Moore, supra. Hervey*, 65 F.3d at 789.

It is conceded that Silva intentionally or recklessly falsified substantial portions of his affidavit to the petitioner's detriment but because there was a fair probability that the petitioner possessed in her home writings and recordings relevant to her daughter's death—as any mother would----there was sufficient cause for the magistrate to issue the warrant and preserve Silva's qualified immunity to this abusive search(App. 9-10).

The petitioner submits that the burden which she as a civil rights plaintiff must bear in responding to a police officer's motion for summary judgment based upon his qualified immunity to liability for falsifying an application for a search warrant has not deterred police lawlessness in this case, has protected Silva from liability for blatantly fabricating evidence and has undermined the very purpose of Section 1983—to provide her a remedy for the violation of her federal rights. See *Crawford-El v. Britton*, 523 U.S. at 594-595.

In situations of abuse of office, an action for damages offers the only realistic avenue for vindication of constitutional guarantees. *Harlow v. Fitzgerald*, 457 U.S. 800, 814(1982) citing *Butz v. Economou*, 438 U.S. 478, 506(1978). The petitioner has suffered the murder of her daughter by a person known to the police, the failure of the police to investigate the crime, the fabricated charge by the police nine years after Terese's death that she herself is the murderer, and then the demeaning use of an abusive search warrant to punish and intimidate her. The petitioner is entitled to a remedy under Section 1983

for these serial violations of her constitutional rights.

3. The Petitioner's Proof Stated A Viable Claim Under 42 U.S.C. Section 1983 Because Silva's Conduct Violated The Petitioner's Substantive Due Process Rights.

The touchstone of substantive due process is an individual's right to be free from the arbitrary action of government. *Collins v. Harker Heights*, 503 U.S. 115, 125(1992). *Daniels v. Williams*, 474 U.S. 327, 331(1986). *Poe v. Ullman*, 367 U.S. 497, 542- 543(1961)(Harlan, J., dissenting). It serves to prevent governmental power from being "used for purposes of oppression" or arbitrary imposition. *Daniels*, 474 U.S. at 331-332(1986) quoting *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 277 (1856). In practice, substantive due process claims are reserved for those substantial claims which are "otherwise homeless." *Albright v. Oliver*, 510 U.S. 266, 288(1994) (Souter, J., concurring) citing *Graham v. Connor*, 490 U.S. at 395; *Whitley v. Albers*, 475 U.S. 312 (1986); and *Gerstein v. Pugh*, 420 U.S. 103(1975).

Substantive due process analysis is unwarranted only if all of the petitioner's claims are "covered by" the Fourth Amendment. *County of Sacramento v. Lewis*, 523 U.S. 833, 843(1998). If they are not, then this Court will determine whether Silva's conduct is actionable under Section 1983 for substantive due process violations. *Id.* at 843-849. The gravamen of the petitioner's constitutional claims is that Silva deliberately misstated and omitted at least 31 crucial facts in his affidavit in order to cast the petitioner as a suspect in her own daughter's death and to harass, intimidate and retaliate against her so that she would quit her demands for an investigation. This is conscience-shocking, arbitrary, oppressive conduct by

Silva not "covered by" the Fourth Amendment, having nothing to do with a "pretrial deprivation[] of liberty," *Albright v. Oliver*, 510 U.S. at 274, and it violates the petitioner's substantive due process rights. *Lewis*, 523 U.S. at 844 quoting *Evans v. Avery*, 100 F.3d 1033, 1036(1st Cir. 1996)("*outside the context of seizure*,...a person injured as a result of police misconduct may prosecute a substantive due process claim under section 1983")(emphasis supplied).

Moreover, as the Magistrate observed, because the petitioner was never charged with a crime, Silva's deliberate, unfair fabrication of evidence leaves her with no remedy at all under the Ninth Circuit's Fourth Amendment analysis(App. 17-18), precisely the kind of "otherwise homeless" but authentic constitutional claim, *Albright*, 510 U.S. at 288, for which substantive due process provides a remedy.

CONCLUSION

For all of the reasons stated herein, a writ of certiorari should issue to review and vacate the judgment of the court of appeals, remanding the matter to the district court for further discovery and a trial on the merits of the petitioner's claims; or to provide her with such other relief as is fair and just in the circumstances.

Respectfully submitted,

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No. 04-55621

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARY STEWART,
Plaintiff - Appellant,
v.
MARTIN SILVA, individually and in his official capacity,
Defendant - Appellee.

December 7, 2005, Argued & Submitted, Pasadena, California

December 27, 2005, Filed

NOTICE: RULES OF THE NINTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

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Before: REINHARDT and RAWLINSON, Circuit Judges, and FOGEL **, District Judge.

OPINION: MEMORANDUM*

Mary Stewart appeals the district court's order granting summary judgment. Unfortunately, § 1983 does not provide a remedy for Ms. Stewart's claimed injuries. As her counsel acknowledged at oral argument, her claim is dependent on the search warrant's being unlawful. Under the applicable law, it was not. Although for purposes of summary judgment Stewart has made an adequate showing that Silva "deliberately or recklessly made false statements [and] omissions" in his affidavit, the misstatements and omissions were not "material to the finding of probable cause." KRL v. Moore, 384 F.3d 1105, 1117 (9th Cir. 2004) (citing Galbraith v. County of Santa Clara, 307 F.3d 1119, 1126 (9th Cir. 2002)). Stewart's redacted version of the affidavit states that she possessed material at her residence relating to the murder of her daughter. The presence of evidence of a crime at a location establishes probable cause for a search warrant to be issued, even though the resident is not a suspect and even though the material could be obtained without a warrant. *See* United States v. Chavez-Miranda, 306 F.3d 973, 978 (9th Cir. 2002); United States v. Collins, 61 F.3d 1379, 1384 (9th Cir. 1995); *see also* Zurcher v. Stanford Daily, 436 U.S. 547, 553-60, 98 S. Ct. 1970, 56 L. Ed. 2d 525 (1978) (holding that the owner of the residence to be searched need not be a suspect). Thus, under the law that binds us, there was probable cause for issuance of the warrant. Because the issuance of the search warrant did not violate the Fourth Amendment,

we are compelled to affirm the judgment regardless of any wrongs committed by Silva.

AFFIRMED.

---------- Footnotes ----------

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The Honorable Jeremy D. Fogel, United States District Judge for the Northern District of California, sitting by designation.

Filed 3/16/2004
NO EDCV 02-177-SGL,
UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA

MARY STEWART,
Plaintiff,

v.

MARTIN SILVA, individually and in his official capacity,
Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGEMENT

On June 9, 1992, someone killed Terese Stewart in her home The Riverside County Sheriff's Department and Riverside County Cororner's Office ruled the killing a suicide Plaintiff Mary Stewart, Terese's mother, believes her daughter was murdered by John Wesley, a former personal and business associate of both herself and Terese.

Following the coroner's official findings, Mary Stewart actively pursued a more thorough investigation of her daughter's death, hired a private investigator, and attempted to convince various law enforcement agencies to reexamine the case.

In December, 2000, after more than nine years, Detective Martin Silva, a Senior Investigator with the Riverside County District Attorneys office, was

assigned to reinvestigate the case. As part of his investigation, Detective Silva applied for a search warrant of Mary Stewart's current residence for the stated reason of obtaining documentary evidence he believed was located there. On March 27, 2001, Judge Becky Dugan of the Riverside County Superior Court issued the warrant based on Detective Silva's sworn affidavit. Detective Silva and other law enforcement officers executed the warrant later that same day and retrieved property from the residence, some of which has been returned.

To date, no one has been charged in the death of Terese Stewart.

On March 8, 2002, Mary Stewart filed this action under the Civil Rights Act of 1871, 42 USC § 1983, against Detective Silva claiming that he violated her constitutional rights secured by the Fourth and Fourteenth Amendments of the United States Constitution.

She alleges that the affidavit he prepared in support of the search warrant contained numerous false statements and material omissions.

On December 2, 2003, defendant moved for summary judgment claiming that he was entitled to qualified immunity regarding the preparation and execution of the affidavit. Oral argument was heard on January 12, 2004, and February 24, 2004. Trial is scheduled for March 16, 2004. For the reasons set forth

below, the motion is granted and the trial date is vacated

I. DISCUSSION

Section 1983 creates a private right of action against individuals who, acting under color of state law, violate federal constitutional or statutory rights.42 USC § 1983. Qualified immunity, however, shields defendants "[f]rom liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known " Harlow v Fitzgerald, 457 818 (1982).

In Saucier v Katz, 533 U S 194 (2001), the Supreme Court clarified the two-step qualified immunity inquiry. To decide whether a defendant is protected by qualified immunity, a court must first determine whether, "[t]aken in the light most favorable to the party asserting injury, the facts alleged show the officer's conduct violated a constitutional right " Id at 2156. If the factual allegations in the complaint do add up to a violation of the plaintiff's federal rights, then the court must proceed to determine whether the right was "clearly established," i e, whether the contours of the right were already delineated with sufficient clarity to make a reasonable officer in the defendant's circumstances aware that what he was doing violated the right. Id

In a Fourth Amendment case, "if an officer `submitted an affidavit that contained statements he

knew to be false or would have known were false had he not recklessly disregarded the truth and no accurate information sufficient to constitute probable cause attended the false statements, he cannot be said to have acted in an objectively reasonable manner,' and the shield of qualified immunity is lost " Branch v Tunnell, 937 F 2d 1382, 1287 (9th Cir 1991) (emphasis added).

The Ninth Circuit has "established a heightened pleading standard for a plaintiff to establish that the defendant knowingly or recklessly misled the magistrate" Hervey v. Estes, 65 F 3d 784, 788 (9th Cir. 1995. Moreover, even where a plaintiff meets this heightened pleading standard in the complaint, the plaintiff must satisfy an even higher standard to survive summary judgment "The plaintiff 'alleging judicial deception "must make a substantial showing of deliberate falsehood or reckless disregard for truth" and "establish that, but for the dishonesty, the challenged action would not have occurred"'" Id at 788-89 (quoting Branch, 937 F 2d at 1388, quoting Snell v Tunnell, 920 F 2d 673, 698 (l0th Cir 1990). Only if plaintiff survives this higher standard may the case proceed to trial.

> In sum, a plaintiff can only survive summary judgment on a defense claim of qualified immunity if the plaintiff can both establish a substantial showing of a deliberate falsehood or reckless disregard and establish that, without the dishonestly included or omitted information, the magistrate would not have issued the warrant. Put another way, the plaintiff must

> establish that the remaining information in the affidavit is insufficient to establish probable cause The showing necessary to got to a jury in a section 1983 action is the same a the showing necessary to get an evidentiary hearing under Franks. Hervey, 65 F 3d at 789

The Ninth Circuit has emphatically rejected the notion that a claim of qualified immunity is defeated by a showing a police officer deliberately made false or misleading statements. To secure a trial, a plaintiff "must establish both a substantial showing of the deliberate falsity or reckless disregard of the truth of the statements in the affidavit and the materiality of those statements to the ultimate determination of probably cause. " Id (emphasis added), United States v Celestine, 324 F 3d 1095, 1102 (9th Cir 2003) (warrant may only be challenged if "the falsified information was necessary to the finding of probable cause"). The question of whether, in the absence of the false statements and the inclusion of the material omissions, the magistrate would have issued the warrant is squarely a question for the court. Id at 789, n 5, see also Massachusetts v Upton, 466 U s 727, 728 (1984) ("the task of reviewing Court is not to conduct a de novo determination of probable cause, but only to determine whether there is substantial evidence in the record supporting the magistrate's decision to issue the warrant").

As set forth below and as explained on the record at the hearings in this case, this Court finds that, given all of the circumstances set forth in the affidavit,

once the false statements are omitted and the material omissions are included "there is a fair probability that evidence of a crime" would have been found in the place to be searched, Illinois v Gates, 462 US 213, 238 (1983), that the magistrate would have issued the search warrant and that, accordingly, Detective Silva is protected by qualified immunity. [1]

In opposition to the summary judgment motion, counsel for plaintiff took Detective Silva's affidavit and extensively revised it. Based on all of plaintiff's factual allegations that she believes she would prove at trial, her counsel deleted all false statements and included all material omissions. See Corrected or "Redacted" Affidavit, filed December 22, 2003 ("redacted affidavit" or "RA"). For purposes of resolving this motion, the Court accepts the plaintiff's redacted affidavit as the product of what she believes she would be able to prove at trial that is to say, for purposes of summary judgment, the Court accepts as true that all putative false statements have been purged from and material omissions included in the redacted affidavit. However, after carefully reviewing the redacted affidavit, the Court finds that, even if Detective Silva had presented the redacted affidavit to a reasonable magistrate, this Court cannot say "that magistrate would plainly have not issued the warrants" and therefore Detective Silva is entitled to qualified immunity. Lombardi v City of El Cajon, 117 F 3d 1117, 1127 (9th Cir 1997).

Detective Silva sought the search warrant in question for the stated and limited purpose of retrieving the following from the current residence of

Mary Stewart. "All writings and recordings by Mary Stewart pertaining to this case." See Defendant's Request to Take Judicial Notice, Exhibit A, at 1 Although neither cogent nor artful, and replete with information best not included, Detective Silva's affidavit, even as revised, establishes sufficient probable cause for a reasonable magistrate to have found that, present in Mary Stewart's then current residence, there existed writings and recordings by Mary Stewart relevant to the murder investigation at the time Detective Stewart applied for the warrant.

The facts established by the revised affidavit are set forth below.

Terese Stewart was murdered on June 9, 1992, in her converted apartment attached to the residence of her mother, Mary Stewart RA at 2-3. Prior to the murder, Terese Stewart, Mary Stewart, John Wesley, and Lynn Wesley, John's wife, were involved, in varying degrees, in a computer business of some sort called Giant Corporation. RA at 3,8 The personal an business relationships between these four individuals were long-standing and, at the time of Terese's death, very acrimonious. RA at 3-4, 8 There is substantial evidence that John Wesley had made threatening, intimidating, and, for lack of a better phrase, bizarre remarks to and about Mary Stewart and her daughter just prior to Terese's death. RA at 6-8 Terese Stewart appeared "worried" to Mary Stewart the day of her death. RA at 8 Mary Stewart affirms that she was taking an active role in advising Terese on how to deal with John Wesley during this troubling time, and in

fact had met with the Wesleys to discuss business concerns the day of Terese's death. Id Mary Stewart reports that she "wrote out her thoughts about how to deal with the Wesleys and what to tell Terese about them the next day" while lying in her bed the very night Terese died in her room in the adjacent. converted garage. RA at 11

Two possible theories of who committed the murder are posited in the affidavit. One, advocated by Mary Stewart and the private investigator she employed, is that John Wesley - who along with Mary Stewart, Mary's son, and a housekeeper had access to the Stewart residence - killed her daughter and subsequently seized control of Giant and its assets. RA at 7, 14 John Wesley admits that he and Mary Stewart were fighting, "expressed venom" toward Mary Stewart, and indicated that he and his wife were ending their business relationship with Mary Stewart ("taking their things from Giant and quitting their jobs at Giant Corporation"). RA at 3-4 John Wesley lacked an alibi for the time of the murder, made various and numerous incriminating and contradictory statements following the murder, had a history of violent and intimidating behavior, and, after Terese's death, took possession of a valuable computer software program designed by Terese. RA at 3-6,

The second theory, advocated by John Wesley, is that Mary Stewart killed her own daughter. Evidence of motive for this theory is supplied almost exclusively by statements attributed to John Wesley, a convicted fraudster whose pattern of subsequently-proven

criminal conduct aimed at the Stewarts and others makes his statements highly suspect. RA at 3, 6-7 John Wesley provided various salacious but unsubstantiated reasons for why Mary Stewart would kill her daughter.RA at 3-4, 7, 15-16 As for opportunity, Mary Stewart claims to have been working alone late the evening of the murder before returning home. RA at 10 Also of potential significance is the fact that the gun used to kill Terese belonged to and was in the possession of Mary Stewart prior to the murder. RA at 13 The gun was given to Mary Stewart for her protection by a friend. Id Mary Stewart claims that she never used the gun, and in fact had never learned to load or fire it. RA at 14 During Detective Silva's interview of Mary Stewart,

> Mary said whoever used the gun against Terese had wrapped the gun back up inside the plastic sack and put it back on her [Mary Stewart's] dresser as if nothing had been removed from the bag. Mary said if the sack had been open she would have noticed it when she took off her jewelry and placed the jewelry on the dresser as she prepared for bed.

RA at 14

When Detective Silva told Mary Stewart that she may be a suspect in the murder, Marty Stewart categorically and repeatedly denied killing her daughter. RA at 16 She initially agreed to take a lie detector test, but later, through her attorney, declined a scheduled examination. Id

Detective Silva found the latter theory - that Mary Stewart killed Terese - more convincing than the theory that John Wesley, or someone else, killed Terese. R.A. at 18 Much of plaintiff's opposition to the motion for summary Dudgment - indeed, the gravamen of plaintiff's complaint - is directed at the defamatory nature of Detective Silva's opinion - an opinion which has never resulted in any formal charge and an opinion which this Court finds unconvincing. However, as justifiable as such criticism may be, probable cause for the search warrant in question does not turn on the ultimate validity of either theory of the murder. Rather, regardless of who Detective Silva believed was the murderer at the time he applied for the search warrant, there is ample support, as set forth below, for Detective Silva's stated belief that "having access to more of Mary's writings about this case will aid in determining what happened on the evening Terese was killed." RA at 19 With that opinion this Court cannot argue. First, Mary Stewart herself expressly admitted as much to Detective Silva when she described during her interview "additional items in [her] files which she thought might be useful" to the investigation, moreover, Detective Silva observed, with his own eyes, the substantial amounts of documents to which Mary Stewart referred. RA at 17

To begin, during his interview of Mary Stewart, Detective Silva learned the following

> Mary said she still has at her home the notes she wrote out the night of June 9, 1992, and would supply them to [me] if desired. Mary mentioned

other items she had saved for over nine years which she said might be helpful in a homicide investigation in behalf of Terese and she would supply those, too, if desired. Mary said Wesley claimed he found a "bloody napkin" by Mary's bed when she was gone from the home after the sheriff's investigation Mary said Wesley had given her private investigator the "bloody napkin" which she said is actually a facial tissue with three tiny spots of blood on it. Mary said she suspected it was blood from a minor skin break on her neck. Mary said that when she is highly stressed her skin sometimes breaks and slightly bleeds and John Wesley had highly stressed her in the weeks and days prior to Terese's death and there was a skin break on her neck at the time.

RA at 11

The revised affidavit reports that on the same day of the interview Detective Silva accompanied Mary Stewart to her current residence - the subbect premises of the search warrant - where Mary Stewart provided Detective Silva some of the items she had mentioned, including the "bloody napkin." RA at 17 Detective Silva reported that, "[w]hile Mary was looking through her files and cabinets to find the items I asked for, she mentioned additional items in the files which she thought might be useful and offered them to me, some of which I took." Id He continued

> I could see numerous amounts of paperwork, writings and cassette tapes in the cabinet. [I] did not ask Mary for these items at the time because of the time of night and [I] felt that a search of the residence would be more fruitful. Mary told me that she had kept over the past nine years every note, every item, which pertained to this case. She seemed quite willing to provide anything I might like to have Mary gave [me] the blood-spotted facial tissue, two cassette tapes from Mary and Terse's answering machine from June 1992, Terese's keys, Terese's Daytimer, a casette tape of Mary's interviews with neighbors in the days following Terese's death, cassettee tapes and notes of Mary's two interviews with David Brazeau, manufacturer of the gun, in which she sought his help in understanding how the gun might have got jammed after Terese was shot, and asked his opinions as to whether the gun imprint on the chest of Terese's shirt could have resulted, as claimed by the Sheriff detective, from the gun falling from Terese's hand after she shot herself.

RA at 17

That Detective Silva was premature, incorrect, or, as the plaintiff insists, entirely unsubstantiated in concluding that Mary Stewart killed Terese - a proposition unnecessary to establishing probable cause in this case - does not in any way taint or undermine the evidence set forth in the revised affidavit that written materials relevant to this on-going investigation were

then present at Mary Stewart's residence. Mary Stewart told Detective Silva the items were present, she had provided him samples of such items, and he had observed additional items present. That Detective Silva sought a search warrant instead of relying on Mary Stewart to voluntarily provide all of the pertinent documents and other physical materials relevant to his investigation is of no moment, as plaintiff's counsel conceded at oral argument, there are legitimate investigative and prosecutive reasons which counsel in favor of an investigator seeking a search warrant in lieu of relying solely on the good faith of a party who is, at best, a material witness and, at worst, a suspect, to provide all of the documents in question and to do so in such a way that would not be subject to impeachment in a subsequent prosecution. To allow a jury to second guess whether pertinent evidence should have been obtained by voluntary consent or by a search warrant is precisely the type of inquiry shielded by qualified immunity.

Although this Court is disturbed by both the nature and quantity of the apparent misstatements and material omissions in Detective Suva's affidavit, it is compelled by the law of this Circuit to find that his affidavit and the subsequent search of Mary Stewart's residence is protected by qualified immunity.

This is not one of those clear cases where the importance of the false information or material omissions are obvious and, without them, nothing remains in the affidavit to support the issuance of a warrant. See, eg, Hervey, 65 F 3d at 791. Rather, this

is clearly a case where "it is not plain that a neutral magistrate would not have issued the warrant," and therefore "the shield of qualified immunity should not be lost, because a reasonably well-trained officer would not have known that the misstatement or omission would here any effect an issuing the warrant " Lombardi, 117 F 3d at 1126

II. CONCLUSION

The defendant's motion for summary judgment is GRANTED, the trial date is VACATED, and counsel for defendant is directed to submit a proposed order of judgment within five days from the date of this order

STEPHEN G LARSON
UNITED STATES MAGISTRATE JUDGE

---------- Footnote ----------

Fn1At the second hearing on defendant's summary judgment motion, the Court opined that perhaps a due process claim predicated on Detective Silva's alleged abusive use of an otherwise valid search warrant to harass or defame Mary Stewart might survive the Court's finding of qualified immunity as to the Fourth Amendment unreasonable search claim. In Devereux v Abbey, 263 F 3d 1074, 1076 (9th Cir 2001), for example, the Ninth Circuit indicated that it would consider a deliberate-falsification-of-evidence claim where plaintiffs could demonstrate that defendants continued their investigation despite the fact that they knew or should have known that the suspect was innocent, or

used investigative techniques that were so coercive and abusive that they knew or should have known that those techniques would yield false information. Id at 1076The deliberate falsification claim is predicated, however, on the "clearly established constitutional due process right not to be subjected to criminal charges on the basis of false evidence that was deliberately fabricated by the government." Id at 1074-75 In the instate case, however, no criminal charges have ever been brought against Mary Stewart, and the Court in Devereux made clear that merely using investigative "techniques that were in some sense improper without more [] cannot serve as the basis for a claim under § 1983." Id at 1075 Moreover, the Supreme Court has held that "[i]f a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the clam must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process." County of Sacramento v Lewes, 523 U S 833, 843 (1998), see also Fontana v Haskln, 282 F 2d 871, 881-82 (9th Cir 2001) The lack of any Fourth Amendment violation is also fatal to any due process-based defamation claim. See Miller v California, 355 F.3d 1172, 1178(9th Cir 2004).(" [R]eputational harm alone does not suffice for a constitutional claim. Rather, to support a claim under § 1983, the [plaintiff] must show that the stigma was accompanied by some additional deprivation of liberty or property. ")

No. 04-55621

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARY STEWART,
Plaintiff - Appellant,
v.
MARTIN SILVA, individually and in his official capacity,
Defendant - Appellee.

1/17/2006, Filed

Before: REINHARDT and RAWLINSON, Circuit Judges, and FOGEL *, District Judge.

The petition for rehearing is DENIED.

---------- Footnote ----------

* The Honorable Jeremy D. Fogel, United States District Judge for the Northern District of California, sitting by designation.

(2)

No. 05-1330

FILED
MAY 18 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

MARY STEWART,

Petitioner,

v.

MARTIN SILVA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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SUMMARY OF ARGUMENT

A California court issued a search warrant based on Respondent's application. Petitioner contends the application for the search warrant contained false statements and omitted material information. The district court ruled that even if every alleged false statement is removed, and every item of alleged omitted information is added to the application, there remains probable cause for the search. The Ninth Circuit affirmed that decision. Both courts followed settled law which holds that immaterial errors in an application for a search warrant are not a basis for liability.

The decisions of the courts below are completely consistent with settled law from this Court and from every circuit court. The remainder of the petition addresses issues not raised below. Those issues are not properly before this Court, and at any rate, are not supported by the record. Since there are no conflicts among the circuits and no issues which merit this Court's attention, the petition should be denied.

STATEMENT OF THE CASE

The district court granted Respondent's motion for summa y judgment. The court heard oral argument on the motion, then allowed Petitioner to file a supplemental opposition and Respondent to file a supplemental reply. As detailed below, the district court assumed Petitioner could prove everything she alleges, and resolved all factual conflicts in Petitioner's favor, but still found probable cause for the warrant. (App. 16-17)

The Ninth Circuit, with a panel composed of Ninth Circuit Judges Reinhardt and Rawlinson and district court Judge Fogel, affirmed in an unpublished opinion. The Ninth Circuit agreed that even if Petitioner could prove everything she alleges, there was still probable cause for the warrant. (App. 2)

FACTS SHOWN BY THE RECORD

A. HOW EVIDENCE WAS PRESENTED IN THE DISTRICT COURT

In the district court, Petitioner filed a brief listing which statements she contended were erroneous and which material facts she contended were omitted. Based on those contentions, she prepared a "corrected" affidavit which omits all statements she contends are false, and which adds all statements she contends constitute material omissions. For purposes of ruling on the motion for summary judgment, the district court assumed that Petitioner could prove every alleged false statement and every alleged material omission, and generally accepted Petitioner's "corrected" affidavit as an accurate statement of what Petitioner could prove at trial. The court's order stated:

> In opposition to the summary judgment motion, counsel for plaintiff took Detective Silva's affidavit and extensively revised it. Based on all of plaintiff's factual allegations that she believes she would prove at trial, her counsel deleted all false statements and included all material omissions. [Citation] *For purposes of resolving this motion, the Court accepts the*

> *plaintiff's redacted affidavit as the product of what she believes she would be able to prove at trial*, that is to say, for purposes of summary judgment, the Court accepts as true that all putative false statements have been purged from and material omissions included in the redacted affidavit. (App. 9, emphasis added)

B. THERE WERE NO CONCEDED OR ADMITTED ERRORS

The petition several times says Respondent admitted or conceded numerous errors in the application for the warrant. That simply is not true. The reply to Petitioner's opposition expressly disagreed with almost all of Petitioner's contentions, in large part because most of them are based on hearsay or otherwise inadmissible evidence, or because they are irrelevant. For the remaining contentions, Respondent simply acknowledged the existence of triable issues. At no point did Respondent admit to any false statements or to any material omissions.

C. STATEMENT OF FACTS WITH ALL CONFLICTS RESOLVED IN PETITIONER'S FAVOR

The "corrected affidavit" Petitioner prepared shows the following:

1. The Death of Terese Stewart and the Initial Investigation

On June 10, 1992, Terese Stewart was found dead.

The reporting party was Petitioner, the decedent's mother. The initial investigating officer found a bullet wound to the center of the decedent's forehead.

The decedent lived on the same property as Petitioner, but in a separate bedroom in the garage. Petitioner told the initial investigating officer that she last saw the decedent the prior morning when the decedent left for work. Petitioner told the initial investigating officer that she came home from work and went to bed. The next morning, her dog went directly to the decedent's bedroom and started barking. Petitioner opened the door, went inside, and found the decedent dead of a bullet wound, just as the initial deputy found her. Petitioner told the initial investigating deputy that the gun found by the decedent had been given to Petitioner by a friend for protection.

The case was investigated by Riverside County deputies and was determined to be a suicide. The case was closed and no further action was taken.

2. Second Investigation

Petitioner contended the death was a homicide, not a suicide. She hired a private investigator and also met with employees of the Riverside County Sheriff's Department. In response, the Riverside County Sheriff's Department exhumed the body and had an autopsy performed. The autopsy doctor determined there was a contact wound with a path from the front to the back of the decedent's head. The case was again ruled a suicide and was again closed.

3. Third Investigation

Petitioner contacted the California State Attorney General's office, which in turn contacted the Riverside County District Attorney and asked to have the case reviewed. The case was assigned to Respondent in December of 2000. Respondent is an experienced investigator. As of 2001, he had worked in law enforcement for 16 years, ten of which were as an investigator for the Riverside County District Attorney's office.

Respondent investigated and reviewed the case files. This included reading the documents, listening to some of the interview tapes, and interviewing some witnesses.

4. Application for a Search Warrant

In March of 2001, about three months after he was assigned to the investigation, Respondent filed an application for a search warrant of Petitioner's house. He requested permission to search Petitioner's house and car for

> all writings and recordings by Mary Stewart pertaining to this case. These writings may include a conversation she was to have with her daughter, Terese Stewart, on morning [sic] following Terese's death, tape recorded conversations pertaining to the death of Terese Stewart, newspaper articles pertaining to the death of Terese Stewart, Mary Stewart's appointment book for the